ABX LOGISTICS (MALAYSIA) SDN BHD

v.

OVERSEAS BECHTEL (MALAYSIA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: D1-22-1117-2000]
1 JULY 2003

CIVIL PROCEDURE: *Discovery - Discovery and inspection of documents - Order for - Principles applicable - Whether elements for an order for discovery proven - Whether there was proper basis for such an order*

This was the defendant's appeal against the decision of the senior assistant registrar dismissing the defendant's application for discovery of documents pertaining to a Freight Forwarding, Customs Clearance and Inland Transportation Agreement between the plaintiff and a third party on one side, and the defendant on the other ('the contract'), which the defendant submitted were relevant to its defence and counterclaim. Pursuant to the terms of the contract, the plaintiff issued 32 invoices for the services rendered, and upon the defendant's failure to pay, the plaintiff demanded for the amount outstanding under the said invoices. The defendant alleged that it was the plaintiff who had breached the terms of the contract by failing to provide the documents pertaining to the services itemised in the invoices and the supporting documents for third party billings, and it also disputed the amount claimed by the plaintiff on the grounds that there had been overcharging. The plaintiff, on the other hand, contended that the defendant's allegation of the plaintiff overcharging was unsubstantiated by any evidence, and that the defendant must first discharge its burden of proving that the plaintiff had overcharged the defendant in contravention of the agreement before the order for discovery was granted.

Held:

[1] The essential elements for an order for discovery are threefold; namely, there must be a 'document', secondly, the document must be 'relevant', and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought. On the facts, it was undisputed that the items of which discovery was sought were documents. However, it was incumbent on the defendant to first make out a *prima facie* case of overcharging of the freight charges by the plaintiff; if it succeeded, the discovery of the documents would

then assist in the process of determining the amount involved. Since the defendant had not tendered any credible, cogent or even plausible evidence to support its allegations of the plaintiff overcharging, the irresistible conclusion was that the defendant had embarked on a fishing expedition with the view of formulating its counterclaim. The law on discovery is well settled *ie*, in the absence of a proper basis for an order for discovery, disclosure should not be allowed. Thus, the defendant had failed to establish its entitlement to an order for discovery and inspection as the order could not be made in the absence of any particulars of justification. (pp 361 f, 362 a, h, 363 f & 364 d)

[Appeal dismissed.]

Case(s) referred to:
Australian Diary Corporation v. Murray Goulburn Co-operative Co Ltd [1990] VR 355 ***(foll)***
Berkeley Adminstration Inc v. McClelland [1990] FSR 381 ***(foll)***
Buchanan-Michealson v. Rubinstein & Ors [1965] 1 All ER 599 ***(foll)***
Leitch v. Abbot [1886] 31 Ch D 374 ***(refd)***
Yekambaram Marimuthu v. Malaywata Steel Bhd [1993] MLJU 96 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 24

For the appellant/defendant - TJ Su (KL Pang); M/s Cheah Teh & Su
For the respondent/plaintiff - Wilfred Abraham (Thomas Wong); M/s Zul Rafique & Partners

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

Preamble

Enclosure 32 is the defendant's appeal against the decision of the learned senior assistant registrar on 10 May 2002, dismissing the defendant's application *vide* summons in chambers dated 13 December 2001 (encl. 27A).

The relevant prayers sought by the defendant in the said application are as follows:

1. that the plaintiff do within 30 days from the date of the order:

   (a) make and file an affidavit by one of its directors or officers stating whether it has or has at any time had in its possession, custody or power the documents described in the Schedule below and if any of

the said documents are not now in its possession, custody or power stating when it parted with the same and what has become of the same; …

2. that the plaintiff do within 30 days from the date of the order:

(a) cause to be bound and paginated a copy of all the documents described in the Schedule below which are now its possession, custody or power and serve a copy of the bound documents on the defendant; and …

Schedule

All the:

(a) quotations secured by the plaintiff from the carrier(s) and issued by the carrier(s) to the plaintiff;

(b) purchase orders issued by the plaintiff to the carrier(s);

(c) agreements between the plaintiff to the carrier(s);

(d) invoices issued by the carrier(s) to the plaintiff;

(e) proof of payments made by the plaintiff to the carrier(s);

(f) official receipts issued by the carrier(s) to the plaintiff; and

(g) such other documents which are similar in nature to any of the aforesaid documents;

in carrying out the plaintiff's ocean freight forwarding services to the Freight Forwarding, Customs Clearance and Inland Transportation Agreement dated 9 September 1998 and in relation to the following 32 invoices issued by the plaintiff to the defendant …

A tall order indeed!

Background Facts

Quite simply, the plaintiff's claim against the defendant was based on the Freight Forwarding, Customs Clearance and Inland Transportation Agreement dated 9 September 1998 (the contract) between the plaintiff and another third party on one side and the defendant on the other.

Pursuant to the terms of the contract, the plaintiff issued 32 invoices for the services rendered. Upon the defendant's failure to pay, the plaintiff caused their solicitors to issue a letter of demand for RM371,821.12 being the amount outstanding under the said invoices.

In their defence, the defendant disputed the plaintiff's claim, contending that the suit in the plaintiff's name alone was unsustainable. They alleged that it was the plaintiff who had breached the terms of the contract, by failing to provide the documents pertaining to the services itemised in the invoices and the supporting documents for third party billings. They also denied any obligation to pay, maintaining that payment need only be made within 30 days of receipt of a correct itemised invoice, and disputed the amount claimed by the plaintiff on the grounds that there had been overcharging.

Through the defendant's counterclaim, they sought damages to be assessed and for an order that accounts be taken of all profits and commissions received by the plaintiff in respect of the ocean carrier charges.

The Rephrasing Efforts

When the defendant's appeal came up for hearing on 28 October 2002, the plaintiff objected to the unduly wide and uncertain ambit of para. (g) of Schedule in the application; on the grounds that the defendant's failure to identify the specific documents they were seeking discovery of, made it impossible for the plaintiff to aver an affidavit stating whether they were or had been in possession of any particular documents.

This led the court to direct the defendant to rephrase para. (g) which they did, to read:

> such other documents (including correspondence) which are similar in nature to any of the aforesaid documents and all records and accounts maintained by the plaintiff in connection with the performance of the Freight Forwarding, Customs Clearance and Inland Transportation Agreement dated 9 September 1998, which documents incurred costs, both direct and indirect of whatever nature in relation to the following 32 invoices issued by the plaintiff to the defendant …

The plaintiff continued to have objections to the 'catch all' rephrasing of para. (g), which remained manifestly wide. Despite the problems of ascertaining definitively whether the plaintiff were or had been in possession of specific documents, the plaintiff had nevertheless averred an affidavit to the effect that they might have possession of the related documents.

On 23 January 2003, the defendant further rephrased para. (g) to read:

> all records and accounts (including correspondence) maintained by the plaintiff in connection with the performance of the Freight Forwarding, Customs Clearance and Inland Transportation Agreement dated 9 September 1998, which documents incurred costs, both direct and indirect of whatever nature in relation to the following 32 invoices issued by the plaintiff to the defendant.

The plaintiff then affirmed an affidavit that the only documents which conceivably fell within the ambit of the reamended para. (g), were the plaintiff's internal trade accounts and records, which were confidential in nature and could not be disclosed.

The Law

The defendant's application is under O. 24 of the Rules of the High Court 1980 which provides:

> r. 7(1) Subject to rule 8, the Court may at any time, on the application of any party to the cause or matter, may make an order requiring the other party to make an affidavit stating whether any *document specified or described in the application or any class of document so specified or described* is, or has at any time been, in the possession, custody or power …
>
> r. 8 On the hearing of an application for an order under rule 3 or 7 the Court … shall in any case *refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.* (emphasis added).

I am guided by the judgment of Edgar Joseph Junior SCJ (as he then was) in *Yekambaram s/o Marimuthu v. Malaywata Steel Bhd* [1993] MLJU 96 *(Yekambaram)*:

> The essential elements for an order for discovery are threefold; namely, *first, there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought …*
>
> As to 'relevance', our Rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute.
>
> More particularly, *the discovery obligation applies to documents 'relating to matters in question in the action' or 'relating to any matter in question in the cause or matter'. In practice, relevance is primarily determined by reference to the pleadings …*
>
> … relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. If however, the document's relevance is to the fact in issue, simply not the credibility, it has long been settled that the relevance of an indirect kind suffices. (emphasis added).

The First Element

It is undisputed that the items of which discovery was sought are documents.

The Second Element

The defendant submitted that the documents were relevant to their defence and counterclaim; which was that the plaintiff had overcharged the defendant.

As authority the defendant cited *Leitch v. Abbot* [1886] 31 Ch D 374. Briefly, in that case, the plaintiff alleged that he had employed the defendant as a stockbroker, but the defendant had in many of the transactions dealt with himself as the principal, and had also charged the plaintiff with moneys not paid. The plaintiff delivered interrogatories asking for particulars of the dealings on behalf of the plaintiff and the names of the persons with whom the defendant had dealt and the amounts paid. The defendant refused to answer, hence the application for discovery. The Court of Appeal held that the defendant's answers to the interrogatories were very material to determine whether the defendant was acting as principal or agent and to enable the plaintiff to establish his right to relief. The plaintiff's right to discovery was not reduced by the fact that the plaintiff failed to condescend to details of his general allegation of fraud.

The plaintiff (in the instant case), on the other hand, maintained that the defendant failed to satisfy the second element in *Yekambaram* because the defendant's allegation of the plaintiff overcharging was unsubstantiated by any evidence. The plaintiff submitted that the granting of the order for discovery of these documents now, would be tantamount to putting the cart before the horse. The defendant must first discharge their burden of proving that the plaintiff had in fact overcharged them in contravention of the agreement. Only when an order for an account is made as per the prayer in the defendant's counter claim, will these documents become relevant.

The court was referred to *Buchanan-Michealson v. Rubinstein & Ors* [1965] 1 All ER 599(CA) *(Buchanan-Michealson)* wherein Willmer LJ held:

> … all this argument about discovering of these documents will be entirely academic **unless the plaintiff succeeds in proving the contract which he has sought to set up**. (emphasis added).

The plaintiff's argument finds favour with me. Applying the *Buchanan-Michealson* case to the present matter, I hold that it is incumbent on the defendant to first make out a *prima facie* case of overcharging of the freight charges by the plaintiff. If the defendant succeeds, the discovery of the documents would then assist in the process of determining the amounts involved.

The Third Element

The defendant argued that the rephrased para. (g) is similar to cl. GC 14 of the agreement (exh. A encl. 38A) between the parties. The said clause reads:

> Subcontractor *(the plaintiff) shall maintain records and accounts in connection with the performance of this subcontract which will accurately document incurred costs, both direct and indirect, of whatever nature* for a period of two years from the expiration of this agreement … Contractor *(the defendant),* Owner or representatives *shall have the right to examine* and copy at all reasonable times and with advance notification, *such records and accounts for the purpose of verifying payments or requests for payment when the costs are the basis of such payment and to evaluate the reasonableness of proposed subcontract price adjustments and claims.* (emphasis added).

The plaintiff has consistently maintained that the defendant's failure to identify the specific documents they were seeking discovery of, made it impossible for them to aver an affidavit stating whether the plaintiff were or had been in possession of that particular documents. I am also troubled by the wide terms of para. (g) though rephrased at the court's instance.

The plaintiff further argued that by subsequently asking to add on a default clause to the discovery order, the defendant was seeking to achieve the determination of the entire claim and counter claim *via* the discovery application. The plaintiff was emphatic that this court should not condone such abuse of its process.

In light of the fact that the defendant had not to date tendered any credible, cogent or even plausible evidence to support their allegations of the plaintiff overcharging, this court is inclined to the irresistible conclusion that the defendant had embarked on a fishing expedition with the view to formulate their counterclaim. The law on discovery is well settled; that in the absence of proper basis for an order for discovery, disclosure should not be allowed.

Mustil LJ in *Berkeley Adminstration Inc v. McClelland* [1990] FSR 381 at 383 held that:

> It is plain … that the plaintiff just do not believe anything that the defendants have said in the course of this discovery, and would *like to hunt around the documents in the hope that something useful would turn up enabling them to controvert what the defendants have said on oath. That is not what discovery is about at all.* (emphasis added).

When a similar situation occurred in *Australian Diary Corporation v. Murray Goulburn Co-operative Co Ltd* [1990] VR 355, the Supreme Court of Victoria held that an order for discovery of a range of documents of an uncertain width, description and identity would be attended by substantial injustice. The order

was held to be too wide and uncertain and was directed to the discovery of documents, which did not appear to be relevant to any question of issue to be decided on the pleadings.

Fullagar J had this to say:

> I agree … that the order of the learned judge, like *the order* of the master, *is too wide upon any view of its ambit, and I also agree with his view that it aids the defendant in an illegitimate fishing expedition. I would not deny that the Peruvian Guano case* (referred to below) allows some 'fishing' within certain limits.* (emphasis added)
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> (**Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55).

I am completely ad idem with the above mentioned judgments.

Conclusion

I hold that the defendant has failed to establish their entitlement to an order for discovery and inspection as the order cannot be made in the absence of any particulars of justification. Considering this, the ingenious use of the discovery and inspection mechanism to uncover any document which may later be used to justify the defendant's bare allegation of overcharging by the plaintiff, clearly amount to fishing for evidence.

Therefore, upon careful consideration of the pleadings, the affidavits and the written submissions put in by both sides, I dismiss the defendant's appeal in encl. 32 with costs save the amended prayer 1(d) of item (g) and 1(b) of encl. 27A which was allowed on 26 November 2002, with the consent of both parties.

In Postscriptum

The very fact that promptly after this decision the defendant lodged a notice of appeal to the Court of Appeal lends a ring of truth to Fullagar J's observation that: "The availability of interlocutory steps like discovery and interrogatories is peculiarly susceptible of abuse by a party to litigation who wishes to postpone a decision, …". The defendant must have thought cynically, that, be it 'to postpone a decision' for several years, or fishing to buttress their bare allegation of overcharging they could never lose.